

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



orig - Contains Affidavit of  
marriage.

B

P/S

74-1164

To be argued by  
THOMAS R. PATTISON

---

---

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. T-3050**

---

UNITED STATES OF AMERICA,

*Appellant,*

—against—

FRED FERNANDEZ,

*Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

**BRIEF FOR THE APPELLANT**

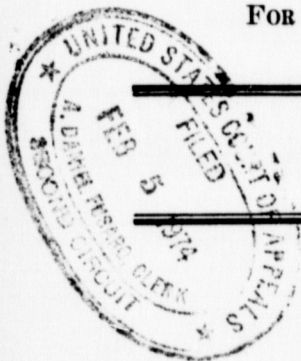
---

EDWARD JOHN BOYD, V,  
*United States Attorney,*  
*Eastern District of New York.*

L. KEVIN SHERIDAN,  
THOMAS R. PATTISON,  
*Assistant United States Attorneys,*  
*Of Counsel.*

---

---



## TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
Statement of the Case .....	1
<b>ARGUMENT:</b>	
The District Court's order dismissing this indictment constituted a gross abuse of discretion and was directly contrary to this Court's prior holding that the disclosure here ordered was not required	4
CONCLUSION .....	5

### TABLE OF CASES

<i>Rovario v. United States</i> , 353 U.S. 53 (1957) .....	2
<i>United States v. Fernandez</i> , 456 F.2d 638 (2d Cir. 1972)	1
<i>United States v. Fernandez</i> , 480 F.2d 726 (2d Cir. 1973)	1



# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. T-3050

---

UNITED STATES OF AMERICA,

*Appellant,*

—against—

FRED FERNANDEZ,

*Appellee.*

---

### BRIEF FOR THE APPELLANT

---

#### Preliminary Statement

This is an appeal by the Government from an order entered December 4, 1973, in the United States District Court for the Eastern District of New York (Weinstein, J.) dismissing as against the appellee, Fred Fernandez, an indictment charging Fernandez with armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d).

#### Statement of the Case

The instant case has twice before been before this Court on appeals by Fernandez from judgments of conviction. Both appeals resulted in reversals. *United States v. Fernandez*, 456 F.2d 638 (2d Cir. 1972); *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973).

In *Fernandez II*, Fernandez raised and this Court specifically considered the issue raised on the instant

appeal. This is the question of whether the Government was required to disclose to the defense the names of two individuals, not witnesses to this bank robbery, who identified for the F.B.I. from bank surveillance photographs two of Fernandez's co-defendants, Jerome Reide and Horsun Howard, and, mistakenly, identified the third robber shown in the photographs (like Fernandez a light skinned black) as one Arthur Teare. See 480 F.2d at 738-39. In *Fernandez II* this Court held that, based upon the Government's representation that disclosure of the identity of these individuals would place them in grave jeopardy and the fact that the defense could through other means show that there had been a misidentification of Teare as the third robber, under the "balancing test" formulated in *Roviaro v. United States*, 353 U.S. 53 (1957), such disclosure was not required. See 480 F.2d at 738, 741.

Following the reversal and remand in *Fernandez II*, this case was reassigned to Judge Weinstein. Despite this Court's prior holding on the point of non-disclosure of these informants' identities, Judge Weinstein held, on defense counsel's renewed motion for their disclosure, that they must be disclosed, indicating that he did not credit the Government's representation that such disclosure posed a hazard to the informants (Transcript of December 3, 1973, p. 45). The Government refused to comply with this order and indicated that it would rather suffer the dismissal of this indictment than expose these informants to the danger that it felt such disclosure would entail (*id.*, at 46). Unswayed by the Government's representations, Judge Weinstein on December 4, 1973, dismissed this indictment as against Fernandez.

Judge Weinstein's decision dismissing this indictment was delivered orally.

At the time he dismissed this indictment, Judge Weinstein stated that the Government, for purposes of appeal, could supplement the record on this issue by filing with the District Court any other materials it felt relevant (Transcript, December 4, 1973, p. 89). However, he also indicated that he had made up his mind on this issue and that such further materials as might be filed with the Court would not influence his decision unless there was an adversary hearing held to consider such materials (*id.*, at 88-89).

In connection with the appellee Fernandez's renewed motion for disclosure of these informants' identities, the Government ascertained that the risk to them from such disclosure still existed (Transcript, December 3, 1973, p. 45). On January 29, 1974, after the Office of the United States Attorney for the Eastern District had been authorized by the Solicitor General's Office to perfect this appeal, the Government filed with the District Court, and asked that these be made a sealed exhibit, affidavits from the two informants. These affidavits document that the disclosure of these informants' identities would still pose a hazard to them.

## ARGUMENT

**The District Court's order dismissing this indictment constituted a gross abuse of discretion and was directly contrary to this Court's prior holding that the disclosure here ordered was not required.**

It is respectfully submitted that in his opinion in *Fernandez II* Judge Friendly quite clearly indicated why the disclosure here ordered by Judge Weinstein should not be ordered. See 480 F.2d at 738-39. Further, it is submitted that Judge Friendly clearly indicated in his opinion that this Court's determination on this issue was intended to constitute the law of the case insofar as this question was concerned at Fernandez's fourth trial. Thus, in his preface to his discussion of "Other Points", at page 738 of 480 F.2d, Judge Friendly wrote:

Of the many additional points of error claimed by defense counsel, it is necessary to consider only those that are likely to affect the next, and what we devoutly hope will be the last, trial.

See also, Judge Friendly's discussion at page 741 of the opinion where he urged the Government to be "forthcoming in disclosure" but expressly excepted disclosure of the material here in issue.

As this Court's examination of the affidavits filed with Judge Weinstein on January 29, 1974 will reveal, the situation of these informants remains essentially unchanged. Disclosure of their identities would place them in grave jeopardy. Accordingly, it is submitted that this Court's decision on this issue in *Fernandez II* should here be applied as the law of this case.



**CONCLUSION**

**The order of dismissal should be reversed.**

Respectfully submitted,

February 1, 1974

EDWARD JOHN BOYD, V,  
*United States Attorney,  
Eastern District of New York.*

L. KEVIN SHERIDAN,  
THOMAS R. PATTISON,  
*Assistant United States Attorneys,  
Of Counsel.*

## AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 4th  
day of February, 1974, I deposited in Mail Chute Drop for mailing in the  
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and  
State of New York, two copies of the BRIEF AND APPENDIX FOR APPELLANT  
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper  
directed to the person hereinafter named, at the place and address stated below:

Eleanor Jackson Piel, Esq.

36 West 44th Street

New York, New York 10036

Sworn to before me this  
4th day of February, 1974

*Frances A. Grant*  
FRANCES A. GRANT  
Notary Public, State of New York  
No. 41-4503731  
Qualified in Queens County  
Commission Expires March 30, 1975

*Carolyn N. Johnson*  
CAROLYN N. JOHNSON

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,  
\_\_\_\_\_, 19\_\_\_\_

United States Attorney,  
Attorney for \_\_\_\_\_

To:

Attorney for \_\_\_\_\_

SIR:

PLEASE TAKE NOTICE that the within is a true copy of \_\_\_\_\_ duly entered herein on the \_\_\_\_ day of \_\_\_\_\_, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,  
Dated: Brooklyn, New York,  
\_\_\_\_\_, 19\_\_\_\_

United States Attorney,  
Attorney for \_\_\_\_\_

To:

Attorney for \_\_\_\_\_

Action

No. \_\_\_\_\_

**UNITED STATES DISTRICT COURT**  
**Eastern District of New York**

—Against—

United States Attorney,  
Attorney for \_\_\_\_\_  
Office and P. O. Address,  
U. S. Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

Due service of a copy of the within \_\_\_\_\_  
\_\_\_\_\_ is hereby admitted.

Dated: \_\_\_\_\_, 19\_\_\_\_

Attorney for \_\_\_\_\_